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JURISDICTIONAL STATEMENT

Respondent adopts the JURISDICTIONAL STATEMENT of the
Attorney General.

STATEMENT OF FACTS

Mary Katherine Axtell died on February 23, 1960. *App. A 16.*

Her will and testamentary trust dated June 1, 1955 created several trusts. Carroll County Trust Company has at all times been the trustee. *App A.1-3; Party Relator Carroll County Trust Company's Response to Respondent's Answer in Opposition to Writ of Prohibition Issued by the Supreme Court of Missouri .*

Her will and testamentary trust first directed that real estate owned by Axtell in Ray County, Missouri was to be used for the charitable purpose “to begin as a stock ranch with future development, as funds become available, into a boarding ranch for children ranging in age from five (5) years through twelve (12) years, inclusive, for the express purpose of their entertainment and farm life education.” *App A 1.*

A trust was established with income from her real estate in Carroll County, Missouri for seven named individuals, for their lifetime and of the survivors. This trust was to be continued for twenty years after the death of the last to survive and at that time to pay the residue for the same purpose as hereinbefore stated to such capable children as are selected by my said trustee. *App A.2-3.*

Axtell had real estate in Texas. *App. A 3*. The only direction regarding use of this real estate is “Any accumulated funds above cost of maintenance and reasonable compensation for said trustee to be used for the higher education of capable children of Ray and Carroll Counties Missouri, **especially those whose parents are unable, financially, to provide such education.**” (emphasis added). *App. A 2*.

Nothing is contained in the will that the income from the Ray County, Missouri and Texas real estate or the personal property is to be for the benefit of the seven named persons, whose income was to derive solely from the Carroll County, Missouri real estate. *App. A 1-3*.

Since 1960, the year of the death of Mary Axtell to date, the Carroll County Trust Company has:

1. Never operated the Ray County, Missouri real estate as a boarding ranch for children.
2. Never operated the Ray County, Missouri real estate as a stock ranch.
3. Never taken income from the sale of the Texas real estate and provided any financial assistance for the academic interests of children from Ray County or Carroll County, Missouri. *Party*

Relator Carroll County Trust Company's Response to

Respondent's Answer in Opposition to Writ of Prohibition

Issued by the Supreme Court of Missouri, ¶¶ 5-7.

Plaintiff Lucille Palmer is the sole remaining life beneficiary under the will. *App. A1.*

Class plaintiffs allege a breach of trust by the Carroll County Trust Company. *App A13-40.*

Upon MOTION TO CERTIFY ACTION AS CLASS ACTION (*App A 8-12*) dated January 13, 2000, the trial court did on March 25, 2002 enter its ORDER GRANTING CLASS ACTION STATUS TO PLAINTIFFS HALL, CARR AND GILBOW. *App A 4-7.* In the MOTION TO CERTIFY ACTION AS CLASS ACTION, the Plaintiffs identified certain members of the class to include ‘ . . . **especially those whose parents are unable, financially, to provide such education . . .**’ *App A 8.* the ORDER GRANTING CLASS ACTION STATUS TO PLAINTIFFS HALL, CARR AND GILBOW identified members of the class to include “capable children desiring higher education of Ray and Carroll Counties, Missouri, **especially those whose parents are unable, financially, to provide such education and children between the ages of five and twelve desiring to receive a farm life education.**” (emphasis added). *App A 5.*

Relator Carroll County Trust Company appealed the ORDER GRANTING CERTIFICATION to the Missouri Court of Appeals for the Western District on May 7, 2002. This appeal was dismissed on June 20, 2002. *Relator Carroll County Trust Company STATEMENT OF FACTS, pp. 9-10.*

Relator Attorney General filed a Petition in Prohibition in the Missouri Court of Appeals for the Western District, which was denied. *App A 43.*

Relator Attorney General then filed a petition in prohibition with this court. Relator Carroll County Trust Company was granted leave to intervene as an additional relator. This court issued a preliminary Writ on August 27, 2002. Respondent answered the petition. *Relator Attorney General STATEMENT OF FACTS, p 8.*

POINTS RELIED ON

I.

When a special interest in the charitable trust is alleged and an injury to the special interest is alleged, the party with the special interest in addition to the Attorney General may maintain an action against a charitable trustee as the Attorney General is not the exclusive party with standing to maintain an action against a charitable trust.

State Ex Rel. Champion v. Holden, 953 S.W.2d 151, 153

(Mo. App. S.D. 1997).

Masonic Temple Association v. Society, 70 S.W. 3d 24, 26

(MoApp. E.D. 2002).

II.

Prohibition is not an appropriate remedy to attack class action certification as appeal from a judgment is the appropriate remedy and Relators are not entitled to a writ of prohibition as Relators have an appropriate remedy to attack class action certification in appeal.

Koehr v. Emmons, 55 S.W.2d 859 (Mo. App. E.D. 2001).

III.

Prohibition is not an appropriate remedy to undo the past and Relators should not be allowed to attempt to get this Court to undo the past as the trial court has already issued its order certifying that these certain plaintiffs with a special interest may maintain their action as class representatives.

Section 530.010 RSMo 1978.

McDonnell Douglas Corp. v. Gaertner, 601 S.W. 2d 295, 296

(Mo. App. E.D. 1980).

IV.

If Relators are successful in obtaining a permanent writ of prohibition, the Carroll County Trust Company will have succeeded in denying providing trust benefits to a charitable trust for over sixty years, as the will provides for immediate charitable trust benefits and not after the death of certain named individuals.

STANDARD FOR PROHIBITION

Prohibition is an extraordinary writ. It is not a remedy for all legal problems. It is not a substitute for an appeal. *State ex rel. Schoenbacher v. Kelly*, 408 S.W.2d 383 (Mo. banc 1968). Prohibition is preventative and not corrective. Prohibition is to restrain a future act and not undo a past action. *State ex rel. Ellis v. Creech*, 259 S.W.2d 372 (Mo banc. 1953). Prohibition is to be used with great caution for the furtherance of justice. It is to be used only in cases of extreme necessity and not in marginal or questionable situations. *State ex rel. Hilleary and Partners, Ltd. V. Kelly*, 448 S.W.2d 926 (Mo App. St. L. 1969).

Respondent agrees with Relators there are two prerequisites for a writ of prohibition to be considered, a lack of an adequate remedy at law and an absence of jurisdiction in the trial court against which a writ is sought.

A writ of prohibition by its very name is to prohibit an action, not to undo the past. Here, the trial court as already entered its order. *App A 4-7*. Relators did not challenge the ORDER OF CERTIFICATION until after it was entered.

Moreover, class certification can be challenged on appeal. A trial court certified a class action against a junior college district regarding a tax dispute. After a judgment in favor of the class, the appellate court reversed

the trial court certification and remanded the matter back to the trial court with a direction to dismiss all claims for class action status. *Koehr v. Emmons*, 55 S.W.2d 859 (Mo. App. E.D. 2001). Relators have an adequate remedy for the class certification issue. They can appeal any judgment they deem unfavorable on this issue.

Right to sue can be challenged on appeal. A trial court determined the plaintiff public employees of the City of Saint Louis had standing to maintain their action challenging the right of the City of Saint Louis to contract certain services. On appeal, the Eastern District held “Lack of standing cannot be waived and may be considered by the court sua sponte.” *Brock v. City of St. Louis*, 734 S.W.2d 721, 725 (Mo. App. E.D. 1987). The appellate court determined the “Plaintiffs have not established standing to injunctive or declaratory relief as employees or as taxpayers. We remand to the trial court with instructions that the judgment be vacated and the cause dismissed ” *Id.* at 726. Relators have elected to seek a writ of prohibition for matters that, if they are correct, than can achieve by appeal.

Relators try to change the past on a matter for which they have a prospective and adequate remedy.

ARGUMENT

I.

When a special interest in the charitable trust is alleged and an injury to the special interest is alleged, the party with the special interest in addition to the Attorney General may maintain an action against a charitable trustee as the Attorney General is not the exclusive party with standing to maintain an action against a charitable trust.

Decedent Mary Axtell identified persons she wanted to benefit from the charitable trusts she created in her will, including “Any accumulated funds above cost of maintenance and reasonable compensation for said trustee to be used for the higher education of capable children of Ray and Carroll Counties Missouri, **especially those whose parents are unable, financially, to provide such education.**” (emphasis added). *App. A 2.*

The MOTION TO CERTIFY ACTION AS CLASS ACTION identified “capable children of Ray and Carroll Counties Missouri, **especially those whose parents are unable, financially, to provide such education** (emphasis added) and children between the ages of five and twelve desiring to receive a farm life education.” *App A 8.*

The trial court in its ORDER cited “capable children of Ray and Carroll Counties Missouri, **especially those whose parents are unable, financially, to provide such education** (emphasis added) and children between the ages of five and twelve desiring to receive a farm life education.” *App A 5*.

Plaintiffs Carr, Hall, Gilbow represent a special class of beneficiaries with a special interest. They are not the representative of the public at large.

“A charitable trust is enforceable at the suit of the Attorney General, and ordinarily is not enforceable at the suit of any individual beneficiary, although in the case of some charitable trusts there may be beneficiaries having such a special interest in the performance of the trust as to entitle them to maintain a suit to enforce it.” *State Ex Rel. Champion v. Holden*, 953 S.W.2d 151, 153 (Mo. App. S.D. 1997). Relators have not addressed or acknowledged the complete rule regarding special interest beneficiaries of a charitable trust being able to maintain a suit where the Attorney General fails to act.

When the Masonic Temple, owner of the real property, was dissatisfied by the perceived lack of maintenance of the real property that was to be maintained by a charitable entity, the Society for the Preservation of the Masonic Temple, and the Attorney General failed to act, it was

determined and held the Masonic Temple could maintain an action against the charitable entity because the real estate interest of the Masonic Temple was special to it as opposed to the general public. “Here, however, it appears the Temple can allege a special interest in the charitable corporation and may have suffered an injury to that special interest from the Society’s alleged failure to maintain the Temple building that is different from or conflicts with the injury to the public interest.” *Masonic Temple Association v. Society*, 70 S.W. 3d 24, 26 (MoApp. E.D. 2002). Interestingly, Relator Attorney General unsuccessfully challenged the claim of the Masonic Temple Association to maintain its suit against the Society and apparently was refusing to protect the public by not moving to preserve this trust corpus.

In the present cause against the trustee Carroll County Trust Company, the class represents a special interest, i.e. the people who are in the specific class of beneficiaries and have been denied the benefits of scholarships and farm life exposure. They are not citizens at large. The class includes people whom Axtell wanted to help, the poor who could not afford a college education and youth who might otherwise not be exposed to certain aspects of farm activities. These people have a special interest, different and distinct from the public at large. The trial court correctly

acknowledged this in its ORDER. Relators have not acknowledged this distinction.

II.

Prohibition is not an appropriate remedy to attack class action certification as appeal from a judgment is the appropriate remedy and Relators are not entitled to a writ of prohibition as Relators have an appropriate remedy to attack class action certification in appeal.

If the trial court is wrong in certifying these Plaintiffs Carr, Hall and Gilbow as a class for persons with a special interest, an appellate court can make a later ruling after a final judgment correcting any error. *Koehr v. Emmons*, 55 S.W.2d 859 (Mo.App. E.D. 2001). Relators have an adequate remedy for the class certification issue. An appeal from any judgment they deem unfavorable is a legal remedy and is available to parties dissatisfied by a trial court decision on class action certification.

As stated above and as acknowledged by Relators, prohibition is to be used when there is no adequate remedy at law.

Moreover, neither Relator has cited any case, rule or statute that holds a class action certification may not be challenged on appeal.

III.

Prohibition is not an appropriate remedy to undo the past and Relators should not be allowed to attempt to get this Court to undo the past as the trial court has already issued its order certifying that these certain plaintiffs with a special interest may maintain their action as class representatives.

“The remedy afforded by the writ of prohibition shall be granted to prevent usurpation of judicial power, . . . “ Section 530.010 RSMo 1978. Prohibition is to prevent a trial court from acting without or in excess of its jurisdiction. “It is preventive in nature rather than corrective. The writ issues to restrain the commission of a future act and not to undo one that has already been committed.” *McDonnell Douglas Corp. v. Gaertner*, 601 S.W. 2d 295, 296 (Mo. App. E.D. 1980).

Respondent has already acted. The Order has been issued. *App A.4-7*. There is nothing to prohibit as it is already done. A writ of prohibition cannot change history.

IV.

If Relators are successful in obtaining a permanent writ of prohibition, the Carroll County Trust Company will have succeeded in denying providing trust benefits to a charitable trust for over sixty years, as the will provides for immediate charitable trust benefits and not after the death of certain named individuals.

Respondent acknowledges any appellate court has the authority to interpret the meaning and content of a testamentary document, including the Axtell will.

Relator Attorney General advances the position no charitable trust provisions are to begin until twenty years after the death of the last named individual beneficiaries. With all due respect to Relator Carroll County Trust Company, of course the trustee hopes this is the interpretation as it has not paid one penny in charitable distribution since it became the trustee in 1960. *Party Relator Carroll County Trust Company's Response to Respondent's Answer in Opposition to Writ of Prohibition Issued by the Supreme Court of Missouri .*

Relators are wrong in their reading of the Axtell will. *App A 1-3.*

It is the correct reading and interpretation of the Axtell will that the charitable provisions were to begin from the death of Axtell in 1960 from the Ray County, Missouri real estate and the Texas property. The trustee Carroll County Trust Company has failed to act appropriately for the charitable beneficiaries for forty-two years.

The Axtell document provides the income from the Ray County, Missouri real estate is to be used for charitable purposes immediately. There is nothing in the Axtell will that suggests or hints the income from the Ray County, Missouri real estate is to benefit the seven named individuals. There is nothing in the Axtell will that suggests the Texas property or any personalty is to be used for the benefit of the seven named individuals. Specifically, the seven named individuals are to receive the income from the Carroll County, Missouri real estate. That is acknowledged by the last individual survivor in the second amended petition. *App. A 13-42.*

Neither Relator has identified any language that hints or suggests the Ray County, Missouri, the Texas property or the personalty is for the benefit of the seven named individuals.

It will be an egregious wrong if the trustee Carroll County Trust Company is allowed to avoid making proper accounting and distribution

from a charitable trust for forty-two years and continue this breach of its fiduciary obligation for at least another twenty years.

Yet that is the position Relators ask you to advance.

If the Attorney General is wrong in its reading of the will today, there is no assurance the Attorney General will be correct at the end of any twenty year period.

CONCLUSION

Based upon the record and the facts in this cause, no permanent writ should be issued, the preliminary writ dissolved and the trial court should be allowed to proceed to address the very real problems existing with the trustee.

Submitted respectfully,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 (b) and contains 3,900 words, excluding cover, this certification, signature block and appendix, as determined by Word XP software;
2. That the attached brief includes all the information required by Supreme Court Rule 55.03;
3. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
4. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid on this 4th day of December, 2002 to:

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